No. 85-1462

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1985

ROD WALLACE,

*Petitioner,*

against

JOHN WYNNE HERRON,
JOHN N. GULICK, JR.
LAW OFFICES OF JOHN WYNNE HERRON,
A Professional Corporation,
and DARYL J. MCKINSTRY,

*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION OF RESPONDENTS HERRON, GULICK AND LAW OFFICES

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8 pp

## QUESTION PRESENTED

Did the District Court properly dismiss this malicious prosecution action for lack of *in personam* jurisdiction over the nonresident defendants-lawyers where their only contacts with Indiana were that, during the course of a California lawsuit, one of them came to Indiana to take two depositions, they obtained service of process on an Indiana resident-defendant through the Brown County, Indiana Sheriff, and they filed several discovery requests in the California court requiring some response in Indiana?

## PARTIES

All parties are identified in the caption.[1]

[1] Respondent Law Offices of John Wynne Herron, A Professional Corporation, was a professional corporation organized under the laws of the State of California. It is now referred to as Herron & Herron, A Professional Corporation. It has no parent companies, subsidiaries or affiliates. Supreme Court Rule 28.1.

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## STATEMENT OF THE CASE

For all times pertinent herein, Respondent John Wynne Herron (Herron) resided and practiced law in San Francisco, California. His law firm, Respondent Law Offices of John Wynne Herron, A Professional Corporation (Law Offices), was incorporated under the laws of the State of California. From December 1975 until December 1978, Law Offices employed Respondent John N. Gulick, Jr. (Gulick) as an attorney. (Hereafter Herron, Gulick and Law Offices are collectively referred to as "Respondents".)

In December 1977, Donna Seely and her late husband, Willis Seely, retained Respondents to bring legal action against various persons and entities, including Petitioner, Rod Wallace. That legal action arose out of the purchase by the Seelys of a log cabin and of a franchise to sell similar log cabins in California.

After interviewing the Seelys, conducting preliminary legal research and other investigation, Respondents determined that a cause of action existed against the various defendants, including Petitioner Wallace. Consequently, in February 1978, on the Seelys' behalf, Respondents filed a complaint in El Dorado County, California, against various defendants. Petitioner Wallace was added by amended complaint, filed March 1, 1978, although he was named in the body of the original complaint.

The California trial court denied Wallace's motion to dismiss in May 1978, and required him to file responsive pleadings. The trial court also denied similar motions made by the various other defendants. Those defendants sought an interlocutory appeal of that ruling. While the appeal was pending, Gulick left the employ of Law Offices and had nothing further to do with the *Seely-Wallace* matter. Respondent Herron handled the appeal for the Seelys. The trial court's rulings were affirmed in May 1979.

At the Seelys' request, Respondents Herron and Law Offices withdrew their appearance on May 25, 1979. Respondent McKinstry then assumed supervision of the case. Subsequently, the Seelys, by Respondent McKinstry, agreed to dismiss the case against Petitioner Wallace on April 23, 1983.

On March 27, 1984, Petitioner filed an amended complaint for malicious prosecution against the Seelys and Respondents. Respondents removed the case to the United States District Court for the Southern District of Indiana, Indianapolis Division, pursuant to 28 U.S.C. §1441. (The Seelys are no longer parties to this litigation pursuant to a stipulation of dismissal without prejudice and an order of dismissal entered January 8, 1985, by the District Court.)

Respondents filed a motion to dismiss for lack of personal jurisdiction, as did Respondent McKinstry. On January 9, 1985, the District Court, James E. Noland, J., entered an order dismissing Petitioner's complaint against all of the Respondents. The United States Court of Appeals for the Seventh Circuit affirmed. *Wallace v. Herron*, 778 F.2d 391 (7th Cir. 1985). Petitioner now seeks a writ of certiorari pursuant to 28 U.S.C. §2101(c).

## REASONS FOR DENYING THE WRIT

The petition does not present any reason so important or special to warrant issuance of a writ. The decision of the Court of Appeals rendered below does not conflict with any decision of this Court or of any other federal court. Indeed, the decisions below correctly, accurately and fairly applied familiar, established legal principles recently reaffirmed by this Court to the facts of this case. No reason therefore exists for this Court to exercise its extraordinary discretion and issue a writ.

Petitioner claims the ruling of the Court of Appeals is contrary to this Court's prior decisions in *Burger King Corporation v. Rudzewicz*, ___ U.S. ___, 105 S.Ct. ___, 85 L.Ed. 2d 528 (1985) and *Calder v. Jones*, ___ U.S. ___, 104

S.Ct. 1482, 79 L.Ed. 2d 804 (1984). Petitioner also claims the decision of the Court of Appeals conflicts with decisions of the other federal circuit courts of appeal, citing six specific cases. Neither of Petitioner's claims is true.

First, the decision of the Court of Appeals is not in conflict with *Burger King*. Although Petitioner makes this claim, he does not demonstrate any conflict. Indeed, there is none, because the cases are clearly distinguishable on their facts. *Burger King* involved a breach of contract and not alleged tortious out-of-state conduct. In any event, the Court of Appeals cited *Burger King* with approval and correctly and conscientiously applied its teachings.

The ruling of the Court of Appeals also is not in conflict with *Calder*. (Petitioner failed to raise *Calder* in the trial court.) As the Court of Appeals recognized, 778 F.2d at 395, *Calder*, by its own terms, did not change the bottom line due process analysis for personal jurisdiction: the defendant must still have "certain minimum contacts...such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Calder*, 79 L.Ed. 2d at 811, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This Court in *Calder* cited the familiar minimum contacts cases without comment or criticism. See also *Burger King*, 85 L.Ed. 2d at 542; *Keeton v. Hustler Magazine, Inc.*, ___ U.S. ___, 104 S.Ct. 1473, 79 L.Ed. 2d 790, 797 (1984). The Court of Appeals in this case cited these familiar concepts, as reiterated in *Burger King*, *Calder* and *Keeton*, and then accurately and correctly applied them to the facts of the case before it.

Indeed, the Court of Appeals decision is wholly consistent and fully in accord with the prior decisions of this Court. See, e.g., *Helicopteros Nacionales de Columbia, S.A. v. Hall*, ___ U.S. ___, 104 S.Ct. 1868, 80 L.Ed 2d 404 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 285 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977). Petitioner's reliance solely on

*Calder* implies recognition that the Court of Appeals correctly, accurately, and fairly applied the pre-*Calder* cases of this Court.

Furthermore, the opinion of the Court of Appeals does not conflict with that of any other federal circuit. In each of Petitioner's six cited cases, the court simply cited *Calder* for the familiar tests and applied them to the facts before it. These cases merely illustrate the application of accepted legal principles to the individual facts of each case.

In addition, the cited cases are distinguishable on their facts. None involved malicious prosecution. Three of the six did not even involve an alleged intentional tort so they do not even support Petitioner's alternative phrasing of the question presented. The defendants in all six cases also had demonstrably more significant contacts than Respondents had here. Thus, their facts are not so analogous as to control the disposition of this case. There is simply no split in the circuits requiring clarification by this Court.

The District Court and the Court of Appeals gave full consideration to the issues raised by Petitioner and ruled in favor of Respondents. The result was fair, because due process has always required some modicum of contact with the forum state. *Burger King*; *Calder*. Petitioner presents a question to this Court that involves only the application of familiar legal rules to the facts of this case. Personal jurisdiction cases inherently involve fact intensive inquiries. *Hanson v. Denckla*, 357 U.S. 235 (1958). Certiorari should not be granted merely to review the facts of this case. E.g., *Tacon v. Arizona*, 410 U.S. 351 (1973). The question presented was resolved fairly and correctly in favor of Respondents twice in the proceedings below. The question is not one as to which certiorari should be granted.

Any other result would create confusion and chaos in the established law of personal jurisdiction by undermining all the previous jurisdictional analyses including *Calder* and *Burger King*. As the Court of Appeals pointed out, the practical effect of adopting Petitioner's extreme viewpoint

would be to eliminate all due process protection for foreign defendants upon the mere allegation of an intentional tort. *Calder* did not suggest such a result.

## CONCLUSION

The petition demonstrates nothing that would warrant reexamination of the familiar and settled principles of personal jurisdiction. Given that this Court has recently spoken in *Burger King*, *Calder* and *Keeton*, and the courts below followed those cases, the present petition simply does not present any special or important issue such that this Court should grant certiorari review. The petition should therefore be denied.

Respectfully submitted,

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